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ABSTRACT

This study examined the impact of the U.S. Supreme Court ruling in University of Pennsylvania v. EEOC as it applies to tenure/promotion practices and the disclosure of peer evaluation information. The 1990 decision ordered the university to turn over confidential tenure files to the federal Equal Employment Opportunity Commission (EEOC) pursuant to the agency's investigation of employment discrimination charges at the university. The study sought to determine how the ruling affected the regulations governing tenure at colleges and universities. A total of 224 institutions of higher education with programs which prepared school administrators were surveyed. Of the 224 participants, 149 returned the survey. The survey found that tenure and promotion meetings were closed in 83 percent of their institutions, and that no change in the tenure or promotion process was noted in 67 percent of the responding institutions during the past 5 years. During that time period the number of granted tenure decisions increased, from 28 in 1987 to 65 in 1991. The number of faculty requesting reviews of denial, the number of tenure challenges, and the number of promotion challenges also increased significantly. The findings revealed that the 1990 court decision has had a definite impact on the tenure and promotion policies at many institutions. (Contains 49 references.) (MDM)

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TENURE AND PROMOTION PROCEDURES:

AN ANALYSIS OF UNIVERSITY POLICIES

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TENURE AND PROMOTION PROCEDURES: AN ANALYSIS OF UNIVERSITY POLICIES

Abstract

Post-secondary educational institutions have established various internal procedural requirements for making and reviewing faculty personnel decisions. In the early 1990s, the United States Supreme Court ruled unanimously that the University of Pennsylvania could not withhold confidential peer-review documents from the federal agency that investigates complaints of employment discrimination. This decision affects one of academe's longest standing traditions, the protection of confidential peer-review information. Further, the court's response may increase litigation across the United States.

This study examined the impact of the United States Supreme Court ruling in University of Pennsylvania v. EEOC as it applies to tenure/promotion practices and the disclosure of peer evaluation information. In addition, the study describes changes that have resulted from the court decision.

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Introduction

The phenomenon of tenure in higher education institutions has been viewed as a rite of passage shared by participants at an early career stage (Weeks, 1990; Johnson, 1993). Further, tenure review was assumed to have the major properties of a status passage (Alexander, 1992), including temporal, directional, and actor-specific dimensions (Glaser & Strauss, 1971). Until recently, court decisions concerning tenure differed (Garvie, 1992).

In 1990, this ambiguity changed when the United States Supreme Court ruled that the University of Pennsylvania must disclose confidential tenure files to the Equal Employment Opportunity Commission (EEOC) pursuant to the agency's investigation of employment discrimination charges (University of Pennsylvania v EEOC, 1990). The High Court held that universities do not enjoy a First Amendment or common-law privilege against disclosure of peer review materials which are relevant to charges of discrimination in tenure decisions. This position prompted certain academia to conclude that academic freedom in general (Haydinger & Smsek, 1992), and the autonomy of the tenure process in particular, suffered dangerous erosion (Blackman, 1990; Sandmann & Gillespie, 1991). However, others in academia regarded the ruling as less threatening (Blum, 1990). The present study examined the impact of the unanimous Supreme Court ruling as it applied to tenure/promotion practices and the disclosure of peer evaluation information in higher education institutions.

Historical Precedent for Tenure and Promotion

With passage of Title VII of the Civil Rights Act of 1964, the EEOC was given the authority to investigate charges of discrimination (Schaffrau, 1979; Lacy, 1979) and obtain materials relevant to those charges (Hill, 1983; Headley, 1981). However, this authority applies to the accessing of these files by the EEOC only after a claim has been filed (Blits & Gottfredson, 1990). It does not require colleges to disclose peer evaluation to faculty in the absence of a discrimination claim (Hendrickson, 1990a). Litigation over proper standards to apply (Rasnic, 1991), when requests for these files were initiated, resulted in conflicting decisions from the United States Circuit Courts (Bednash, 1991). In fact, some questioned the constitutionality of Title VII of the Civil Rights Act (Dean, 1979). The federal Court of Appeals also offered divided opinions concerning the appropriate standards to be used to judge demand for such materials (Hendrickson, 1990b). For example, Franke (1990) found that

> The appeals courts in Philadelphia and Atlanta had ordered the materials turned over routinely, while the courts in Chicago and New York had called upon the plaintiff to make some preliminary showing that discrimination may have tainted the review, to overcome the presumption of confidentiality of peer reviews. (p. 24)

A further review of the appellate courts' decisions disclosed that the Third and Fifth circuits refused to recognize the "academic freedom privilege" position asserted by institutions. The institutions argued that the material was protected by "academic freedom" and that peer review material disclosure should not be permitted (Ross & Curcio, 1991). The U. S. Court of Appeals, Fifth Circuit,

disdained any notion that the argument using the First Amendment shielded a colleague of the plaintiff from disclosing the vote on a tenure decision. The court stated:

> We fail to see how if a tenure committee is acting in good faith, our decision today will adversely affect its decision-making process. Indeed, this opinion should work to reinforce responsible decision-making in tenure questions as it sends out a clear signal to would-be wrongdoers that they may not hide behind "academic freedom" to avoid responsibility for their actions. . . . Society has no strong interest in encouraging timid faculty members to serve on tenure committees. (In re Dinnan, 1981, pp. 431-432)

The Third Circuit's EEOC v. Franklin and Marshall College (1986) case granted the college permission to withhold confidential peer reviews of a professor who charged his tenure was denied because of national origin. The court recognized the importance of attaining candid evaluations as described by this case. However, the court also specified the plaintiff's need for information could rely on the relevance and unlawful bias of employment decisions which supersede the institution's argument.

Meanwhile, other circuit courts were not ruling along these lines and appeared willing to consider the academic freedom argument in a more positive light. The Second Circuit in Gray v. Board of Education (1982) was more willing to entertain the "academic freedom argument." The court agreed to use a balanced test to determine whether or not a black professor was told how two colleagues voted on

his tenure. The court ruled in favor of the plaintiff because he had never been given reason for his tenure denial. The Seventh Circuit, in the same vein, developed the qualification privilege in EEOC v. University of Notre Dame (1982). The court stated that the institution has the right to preserve confidentiality, and the members of the committee, therefore, were protected. Specifically, the university had agreed to provide the EEOC with redacted files. The court ruled that the EEOC must accept the redactions because the identity of the evaluations was privileged (EEOC v. University of Notre Dame, 1982).

State courts offered additional decisions which further clouded the issue. In Kahn v. Superior Court (1987), the California Supreme Court denied the right of the plaintiff's attorney to question a member of the tenure review committee, basing its ruling on the privacy provisions of the California constitution. However, the New Jersey Supreme Court ruled that Rutgers University must provide the plaintiff access to her tenure files. Although the court was sympathetic to the confidential review system, the court qualified the assertion that academic freedom privilege could not significantly be enforced at the expense of discrimination (Dixon v. Rutgers University, 1988).

The Case

On January 9, 1990, the United States Supreme Court ruled that the University of Pennsylvania must disclose confidential tenure files to the Equal Employment Opportunity Commission (EEOC) pursuant to that agency's investigation of employment discrimination charges. The court's ruling, and

resulting implications can only be understood by examining the case in detail (University of Pennsylvania v. EEOC, 1990).

The Challenge:

In 1985, the University of Pennsylvania denied tenure to a female, Asian-American associate professor at the Wharton School of Business. Filing a complaint with the EEOC, the professor alleged that she was the victim of discrimination on the basis of race, sex, and national origin. The charge specified that the department chair had sexually harassed the professor due to her insistence on a professional relationship which resulted in his negative letter written to the review committee which subsequently denied her tenure. The professor noted that a majority of the faculty in the department had supported her application for tenure and claimed that her scholarly qualifications were equal or superior to five male faculty members who had received more favorable treatment from the review committee. The professor further alleged that although she had not been given a reason for the committee's denial of tenure, she learned that its decision was predicated on the grounds that "the Wharton School is not interested in China-related research" (University of Pennsylvania v. EEOC, 1990, p. 580). Insisting that this statement constituted a pretext for discrimination, she charged the committee was simply stating that it did not want "a Chinese-American, Oriental, woman in their school" (University of Pennsylvania v. EEOC, 1990, p. 580).

The Legal Positions:

During its investigation, the EEOC requested the release of tenure review materials for the plaintiff and the five male faculty members. When the university

refused to provide the tenure review information, the EEOC issued a subpoena. University officials continued to refuse the request and asked the EEOC to modify the subpoena. The university officials urged, instead, a balancing of First Amendment and social policy interests inherent in the peer review process to minimize the investigation's intrusive effects. Specifically, the university sought exclusion of what they called "confidential peer review information" (Leas, 1990). This information included confidential letters written by plaintiff's evaluators; the department chair's letter of evaluation; documents reflecting the internal deliberations of faculty committees considering applications for tenure, including the department report summarizing consideration of plaintiff's application for tenure; and, comparable portions of the tenure review files for the five male faculty members (University of Pennsylvania v. EEOC, 1990).

The EEOC denied the application for modification, concluding that the withheld information was needed to determine the merit of the allegations. Claiming that such an approach would impair its ability to investigate fully the plaintiff's charge of discrimination, the EEOC rejected the proposed balancing test. After the university continued to withhold the subpoenaed materials, the EEOC successfully sought enforcement of the subpoena in the United States District Court for the Eastern District of Pennsylvania. Three days before the EEOC sought judicial enforcement of its subpoena, the university brought suit against the EEOC in the United States District Court for the District of Columbia seeking declaratory and injunctive relief and an order quashing the subpoena. The Pennsylvania District Court declined to follow its controlling court's announced "first-filed" rule, which

counsels the stay or dismissal of an action that is duplicative of a previously filed suit in another federal court. The United States Court of Appeals for the Third Circuit upheld the declination because at least one of the university's motives was to circumvent local law and preempt the imminent subpoena enforcement action (EEOC v. University of Pennsylvania, 1988).

On appeal, the Court of Appeals for the Third Circuit affirmed the district court's enforcement order (EEOC v. University of Pennsylvania, 1988). Relying upon its earlier opinion in EEOC v. Franklin and Marshall (1986), the court rejected the university's claim that policy considerations and First Amendment principles of academic freedom required the recognition of a qualified privilege. The court further rejected the university's argument for the adoption of a balancing test which would require the EEOC to demonstrate some particularized need, beyond a showing of relevance, to gain access to confidential peer review materials (EEOC v. University of Pennsylvania, 1988). The university then sought certiorari. The United States Supreme Court accepted the case because of the importance of the compelled disclosure issue and to resolve the disparate results in other circuit courts (University of Pennsylvania v. EEOC, 1990; McKillop v. Regents of University of California, 1975).

The University of Pennsylvania claimed a special privilege against disclosure of the peer review materials sought by the EEOC. The university supported its claim on two foundations: the common law and the First Amendment (Hendrickson, 1990b). In practical terms, the university wanted the Supreme Court to require a judicial finding of a particularized need for access,

beyond merely demonstrating relevance, before peer review materials could be disclosed to the EEOC (University of Pennsylvania v. EEOC, 1990).

Common Law Privilege: The university predicated its common-law privilege claim on Federal Rule of Evidence 501.[1] University officials asked the Supreme Court to invoke its authority to fashion a new privilege which they claimed was imperative to protect the integrity of the peer review process in higher education. University officials employed arguments similar to those used in earlier employment discrimination cases: The peer review process is central to the proper operation of colleges and universities (EEOC v. Franklin and Marshall College, 1985; EEOC v. University of Notre Dame, 1982; Gray v. Board of Higher Education, 1982; In re Dinnan, 1981; McKillop v. Regents of University of California, 1975). Since these institutions serve a unique role as centers of learning, innovation and discovery (Morrow, 1990), confidentiality is important to the proper functioning of the peer review process under which such institutions operate (University of Pennsylvania v. EEOC, 1990). Without confidentiality to protect the evaluations of faculty for tenure and promotion, committee members would be less inclined to express themselves candidly. A loss of confidentiality might produce less candid evaluations; granting unqualified faculty tenure would affect the quality of academic departments for years to come. The university furthe contended that Title VII's subpoena enforcement provisions did not endow the EEOC with an unqualified right to acquire confidential peer review evidence (University of Pennsylvania v. EEOC, 1990).

First Amendment Privilege: The university characterized its claim of a First Amendment privilege in terms of academic freedom (Wilsen & Luehrsen, 1990). Officials focused attention on language in prior Supreme Court cases which acknowledged the special role of universities and recognized academic freedom as a "special concern of the First Amendment" (Keyishian v. Board of Regents, 1967, p. 629). Especially emphasized was Justice Frankfurter's concurring opinion in Sweezy v. New Hampshire (1957) which stated that one of the "four essential freedoms" which a university has under the first amendment is the right to "determine for itself on academic grounds who may teach" (p. 1218).

Approaching Justice Frankfurter's opinion, university officials contended that awarding tenure is one way an institution exercises its right to determine "on academic grounds who may teach" (University of Pennsylvania v. EEOC, 1990). They argued that the tenure system controls what a university will look like over time; thus, tenure decisions are the ways in which a university shapes its identity. Accordingly, the most important feature in an effective tenure system is the peer review process which requires candid and detailed written evaluations of the candidate's scholarship. Evaluations from both the candidate's peers at the university and from scholars at other institutions have been provided with a traditional expressed or implied assurance of confidentiality (Rhoades, 1993). Therefore, officials concluded, only confidentiality ensures complete candor in evaluations and allows an institution to make its tenure decisions on the basis of valid academic criteria (University of Pennsylvania v. EEOC, 1990).

University officials cautioned that compelling the disclosure of peer review materials would undermine the tenure decision-making process and significantly limit its First Amendment right of academic freedom. They warned that disclosure could impose an intimidating effect upon peer evaluations and predicted that tenure committees would be unable to rely upon peer evaluations. As a result, academic quality would ultimately decline (University of Pennsylvania v. EEOC, 1990).

Statutory Requirements: Although the university's comprehensive argument was compelling; the EEOC countered with statute (Pappas, 1980; Becker, 1979). The commission's enforcement responsibilities begin once an allegation of employment discrimination is properly submitted (Lacy, 1979). Title VII of the Civil Rights Act of 1964 mandates that such allegations be investigated (Corngold, 1983) to determine whether there is "reasonable cause to believe that the charge is true" (University of Pennsylvania v. EEOC, 1990, p. 583). Specific language in Title VII confers upon the commission a broad access to relevant evidence (Hill, 1983) and the authority to subpoena relevant evidence (Miller, 1980; Bompey & Witten, 1980).

The commission stressed that specific language in Title VII, as amended in 1972, removed the exemption which educational institutions enjoyed prior to that time (Elkiss, 1980; Flygare, 1981). Congress included universities and colleges under Title VII because of rampant discrimination in educational institutions (Blits & Gottfredson, 1990). Thus, the commission declared its obligation to carry out its legal duty to obtain relevant information in order to determine the veracity of the faculty member's allegations (Goldstein & Patterson, 1988).

Focus of the Study

The focus of this study was to determine how the unanimous ruling of the United State Supreme Court in University of Pennsylvania v. EEOC (1990) pursuant to that agency's investigation of discrimination charges affected the regulations governing tenure in institutions of higher education. The purpose was to establish base-line data and examine any changes in the tenure process that have been implemented as a result of the ruling in University of Pennsylvania v. EEOC. At issue were the rules, interpretations, and enforcement of procedures for tenure/promotion during a five year period: three years prior to the Supreme Court ruling, the year of the ruling, and one year following the court's decision.

Prior to the ruling in 1990, the phenomenon of tenure was often viewed as a rite of passage shared by participants at an early career stage which served as a common focus for a more indepth exploration of their lives. It was assumed that tenure review had the major properties of a status passage, including temporal, directional, and actor-specific dimensions (Glaser & Strauss, 1971). Further, tenure has been viewed as complex, variable, and incapable of being framed in a single way that corresponds to a universal form (Smith, 1992; Osumi, 1990). After the Supreme Court ruling, tenure in most states was no longer shrouded in secrecy and mystery (Frost, 1991; Lee, 1990; Wagner, 1991). However, after an initial reaction to the case, determination of the ruling's impact on institutions of higher education and their procedures for granting tenure has not be systematically undertaken (Park & Riggs, 1993; Shils, 1993).

Methodology

Population and Sample

The population for this study was composed of 350 institutions of higher education with programs which prepared school administrators. To insure validity, 224 institutions were randomly selected to participate in the study. The instrument asked participants to respond to items relating to location of the institution by United States judicial circuits, employment position of the respondent, degree programs offered by the institution, number of students in attendance, and financial support for the institution.

Instrumentation

Following a review and discussion of recent court decisions concerning promotion and tenure issues in higher education, a survey was designed by the researchers. Four professors representing expertise in educational law and related areas were contributors to the discussion, survey design, data collection, and data analysis. A survey instrument of 21 items was prepared with the items being presented in random order. Surveys were addressed to individuals when names were available or to titled positions used by the institution. Responses were returned to the researchers in unmarked envelopes to guarantee anonymity.

Findings

Characteristics of the Respondents

One hundred and forty-nine of the 224 participants (67 percent) returned the survey instrument. The largest group of respondents by position was department

chairpersons (representing 72 percent of the respondents). Other positions included program coordinators (14 percent), college deans (10 percent), and others (4 percent). The characteristics of the respondents by institutional size are reported in Table 1.

Insert Table 1 about here

The participants reported that 96 percent of their programs offered masters degrees, 82 percent offered educational specialist degrees, and 56 percent offered the doctorate in educational administration. Eighty-six percent of these institutions were state supported, 11 percent received private aid, and nine percent had religious affiliations. The characteristics of the respondents by United States Judicial Circuit Courts are shown in Table 2.

Insert Table 2 about here

An Overview of the Process

College dean was recognized as the person most involved in the tenure process (named by 141 of the respondents). This position was closely followed by the Vice President for Academic Affairs (131), faculty members elected by their peers

(118), and department heads (113). Most respondents indicated that a college or university committee was used in the tenure/promotion process.

Only elected faculty members serve on these college or university committees at 100 of the institutions responding, while 33 institutions used appointed faculty members. In 36 percent of the responding institutions the department head and/or dean had veto power over college review committee decisions. Also, in 51 percent of the responding institutions the provost made the final judgement.

Results of tenure/promotion/decisions were reported to faculty in a variety of methods. In 33 percent of the responding institutions the provost notified the faculty member of the final decision. The president corresponded with the faculty member in 25 percent of the reporting institutions, while 17 percent received notice from the dean. The remaining informants included the Vice President for Academic Affairs, chairperson, chancellor, vice president, and various others.

University Procedures for Tenure

The participants in this survey indicated that tenure and promotion meetings were closed in 83 percent of their institutions. No change in the tenure and/or promotion process was noted in 67 percent of the responding institutions during the past five years. The tenure and/or promotion files were closed in 57 percent of the responding institutions. Faculty limits to confidential peer review documents were maintained in 45 percent of the institutions, while 48 percent of the institutions did not place limits. Expert reviews of applicant materials in the field, but outside the institution, were required by 35 percent of the institutions. A record of the voting by the tenure and promotion committees was maintained in 67

percent of the reporting institutions, while 5 percent of the respondents did not know if a record was maintained. If a faculty member was denied tenure, 91 percent of the institutions had an appeal process. Table 3 reports issues of tenure and promotion requests during the five period examined by this study.

Insert Table 3 about here

It was assumed by the researchers that institutional responses to University Pennsylvania v. EEOC (1990) would vary depending on the various factors impacting the institution. These included--the mission, the university's culture, state laws, and the precedents established from earlier court rulings. It was necessary also to recognize before beginning this study that certain states had developed, for statewide use, handbooks for contracts, promotions, and evaluations for their faculties.

Discussion of the Findings

One might assume that University of Pennsylvania v. EEOC (1990) clarified the procedures that a tenure and promotion committee should follow in making a negative recommendation on the candidate file, as well as developing procedures and processes an administrator should follow. The case made clear that state laws on procedures must be followed. However, the findings of this study revealed that elected tenured review committee was the most prevalent body involved in the

decision making process. Although it appeared that this committee had primary responsibility for tenure and promotion recommendations, a consistently high percentage of department heads, deans, and vice-presidents participated in the tenure and review process. In fact, the number of administrators actually exceeded those of the faculty review committees. In most institutions, the provost had final judgement for faculty tenure and/or promotion.

This study focused on a five year period from 1987 to 1991. During this five year period the number of tenure decisions increased gradually from 28 in 1987 to 65 in 1991. In like manner, the number of tenure denials increased from five in 1987 to 19 in 1991. The number of faculty requesting reviews of the denial, the number of tenure challenges, and the number of promotion challenges rose during the time period. The largest increase in any area occurred between the years 1990 and 1991. In addition, requests for review and grievance processes more than doubled.

While this increase in requests for tenure and/or promotion and for grievance procedures increased, no change in the tenure and/or promotion procedures occurred in two-thirds of the responding institutions. The majority of committee meetings for tenure and/or promotion remained closed; however, voting records were maintained for most of the committee meetings. In addition, access to confidential peer review documents was limited in approximately half of the reporting institutions.

Implications

An examination of University of Pennsylvania v. EEOC (1990) leads one to conclude that each institution should follow its own state's law related to meetings and records. Further, institutions should develop proper procedures before similar challenges occur. The results of the case indicated that courts may enforce consistent access to tenure files in an effort to ensure that all candidates are treated equally.

The University of Pennsylvania v. EEOC decision provided institutions with the direction and procedures needed as increasing numbers of faculty members were denied tenure during the five year period. The closed door policies used by colleges and universities in the past are not closed as tightly as in the past. Procedures for promotion and tenure can be contested differently than in the past because faculty member must have an open and honest tenure and/or promotion process. No longer can colleges and universities use academe to shield the judgement of evaluators because that shield might contain unlawful discrimination. Institutions can no longer use the argument of academic freedom when dealing with faculty tenure. The court ruling clearly set forth a guideline which peer evaluators must understand: Disclosure in litigation is now the rule, not the exception.

Conclusions

The result of the University of Pennsylvania v. EEOC (1990) case provided a clear message to both institutions of higher education and their faculty members. Prior to the Supreme Court ruling there existed conflicting circuit court decisions regarding tenure and promotion materials and processes. While it appeared to offer

many advantages, as well as disadvantages, the University of Pennsylvania v EEOC case clearly defined the acceptable legal standards for institutions of higher education. Not only did the case resolve conflicting circuit court opinions, it also promoted uniformity in the application of federal law as it related to charges of discrimination within university tenure files. The ruling further clarified that access was available to those relevant comparators. Similarly situated successful candidates files were also subjected to availability. The findings in this study revealed that the court case had definite impact on the tenure and/or promotion process during the past five years.

In the present study an examination of trends revealed an increase in requests for tenure denial reviews. In addition, nearly one-third of the reporting institutions had changed some aspect of their tenure processes since the court ruling.

End Notes

[1] Fed. R. Evid. 501, 28 U S.C.A. provides in relevant part: "Except as otherwise required by the Constitution . . . or provided by Act of Congress or in rules provided by the Supreme Court . . . the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

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TABLE 1

Respondents by Institutional Size

Variable		Frequency	Percent
SIZE			
1000-5000		28	19
5000-10,000		32	21
10,000-15,000		28	19
15,000-20,000		17	11
20,000 - larger		43	29
	TOTALS	148	99

TABLE 2

RESPONDENTS BY US JUDICIAL CIRCUIT

CIRCUIT NO.	Frequency
1	3
2	7
3	7
4	16
5	18
6	14
7	16
8	20
9	17
10	11
11	10
DC	1
BC	1
other	3

TABLE 3

FIVE YEAR PROMOTION & TENURE REQUESTS

Year	1991	1990	1989	1988	1987
ITEM					
Granted Tenure Request	65	37	42	33	28
Denied Tenure	19	12	5	5	5
Asked for Review	21	10	8	7	4
Grieved Tenure Denial	10	3	1	4	2
Grieved Promotion Denial	7	4	3	0	0
Early Tenure Request	21	10	8	7	4
Early Promotion Request	17	5	8	7	4
TOTALS	160	81	75	63	47